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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 295.

LEGH R. POWELL AND HENRY W. ANDERSON,
RECEIVERS OF SEABOARD AIR LINE
RAILWAY COMPANY,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

BRIEF FOR H. D. POLLARD, RECEIVER OF CENTRAL OF GEORGIA RAILWAY COMPANY.

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Page

Statement of the Case 1

I Denied by Commissioners of Pensions to Post Receiver ... 11

II Decision of the Commissioner that claim is unfounded ... 11

III Section 6 of the Act to Regulate Commerce ... 12

IV Service performed by Page and Harris were Post Receiver only Pilot in Port Service. Page and Harris not common carriers subject to Act ... 13

V The Boatswain contract lawfully abrogated charter of Page and Harris ... 21

VI Practical effect of Boatswain decision ... 21

VII Boatswain cannot lawfully abrogate Post Receiver ... 21

VIII The approval by the War Department of contract of June 7 1901 did not give Receiver of Boatswain any right to operate over Port Receiver line ... 22

IX The Court will consider the merits of the Commissioner if valid for any reason ... 23

X The Commissioner is not precluded or estopped by reason of the contentions of the parties. He must himself however be governed by the evidence submitted by the complainant ... 24

XI The burden of Receiver of Boatswain was necessary by § 13 of the Act and the Commissioner erred in not so holding ... 25

XII Receiver of Boatswain under their contract and contract of June 7 1901 with Page and Harris have established their line to Port Receiver and are operating said line contrary to § 13 of the Act ... 26

XIII Port Receiver line is not a mere sentimental issue or sideshow within the meaning of § 13 of the Act ... 27

XIV The order of the Commissioner directed to unlawful and the further ground that Boatswain could operate full and improper powers ... 28

XV The findings of the Commissioner of Pensions hereto and became a part of the findings of Interstate Order by reference thereto and by virtue of the stipulation that the record and evidence of the former Board should be considered in the latter ... 29

XVI The counter claim of the Interstate R. R. Co. against Receiver ... 30

Page

XVII The counter claim filed in conformity with Equity Rule 30 is equitable in character; arises out of the transaction which is the subject matter of the suit, and must be pleaded. If it arose out of extraneous matter, Equity Rule permits the counter claim 47

XVIII The District Court could entertain the counter claim even though under the venue statutes the plaintiffs might not be suable in that District 49

XIX This Defendant, although not made a party Defendant by the bill, is Defendant as a matter of right under the Statute and may plead the counter claim under Equity Rule 30 52

XX The three Judge Court can decide the counter claim as well as the issue in the main case 55

XXI Receivers of Seaboard can be sued in this case without previous leave of the Court of their appointment 60

XXII Leave to sue the Receivers of the Seaboard is not necessary where the suit is a cross action brought in a suit instituted by the Receivers themselves 65

XXIII The order under which the Receviers of the Seaboard were appointed in substance and effect gives leave to sue the Receivers 68

CASES CITED

	Page
Alabama Ry. v. Jackson Ry., 271 U. S. 244	34
Alexander, et al., Receivers, v. Hillman, 296 U. S. 222	52
American Mills v. American Surety Co., 260 U. S. 360	49
Art Metal Works v. Auto Match Corp., 36 F. (2d) 954	50
Atkinson, Receiver, v. Kreis, 140 Ga. 52	64
Atlanta & St. A. B. Ry. Co., Applicant, 71 I. C. C. 784	39
Atlantic Refining Co. v. D. G., 64 I. C. C. 61	25
Ayres v. Carver, 17 How. 591, 595	58
Barrett Co. v. D. G., 88 I. I. C. 535, 539, 540	27, 39
Borne-Scrymser Co. v. Gaffney Mfg. Co., 5 F. S. 405	50
Brandtjen & Kluge, Inc., v. Jos. Freeman, Inc., 75 F. (2d) 472	54
Butterfield Co. v. N. O. & N. E. R. Co., 55 I. C. C. 741, 743	24
Central Trust Co. v. E. T. V. & G. R. R., 59 Fed. 523, 526	61
Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U. S. 53	54
Chestnut Ridge Ry. Case, 37 I. C. C. 558, 562	25
Chicago, M. & St. P. Ry. v. G. N. Ry. Co., 49 I. C. C. 302, 305, 306	27
Coal Rates on Stony Fork Branch, 26 I. C. C. 168	26
Commodity Rates on Brick from Danville to Bronson, 63 I. C. C. 277	27, 39
Corpus Juris 53, §546, p. 333	65
Curtis v. C. & E. Ry. Co., 119 N. E. 723, 725	67
Dayton-Goose Creek Ry. Co., v. U. S., 263 U. S. 456, 458	41
Denver v. N. Y. Trust Co., 229 U. S. 123, 135	51
Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., 286 Fed. 540 (h. n. 2, 3)	38
Dickinson v. Willis, 239 Fed. 171	64
Director General v. Viscose Co., 254 U. S. 498, 504	32
Drayage Absorptions by S. W. M. R. Co., 113 I. C. C. 179	22
E. F. Hauserman Co. v. Wright Metal, Inc., 1 F. S. 43	49
El Dorado & Western Ry. Co. v. C. R. I. & P. Ry. Co., 5 F. (2d) 777	38
Erb v. Morasch, 177 U. S. 584	61
Fahrenwald v. Cope, 38 F. (2d) 251	50
Fort Benning Railroad Co., Acquisition of, 193 I. C. C. 223; 193 I. C. C. 517	14
Frank L. Young Co. v. McNeal Edwards Co., 283 U. S. 398	50
Gableman v. Peoria, etc. Ry. Co., 179 U. S. 335, 338	62
General Elec. Co. v. Marvel Rare Metals Co., 287 U. S. 430	50
Grant v. Buckner, 172 U. S. 232	68
Gulf, C. & S. F. Ry. Co. v. Tex. & P. Ry. Co., 4 F. (2d) 904	37
H. D. Pollard, Receiver, v. H. A. Page and C. F. Harris, et al., 206 I. C. C. 362	14

Page

Iberia & Vermilion R. R., Acquisition of, 111 I. C. C. 660 39
International & G. N. Ry. Co. v. Wynne, 122 S. W. 50 70
Interstate Commerce Com. v. Oregon-Washington R. & N. Co., 288 U. S. 14, 21, 25, 26 54

Kaumagraph Co. v. Gen. Trade Corp., 12 F. S. 230 52
Kortjohn v. Seimers, 29 Mo. A. 271 65

Lancaster, et al., v. Gulf, C. & S. F. Ry., 298 Fed. 488 37
Leman v. Kreutler-Arnold Co., 284 U. S. 448 50

Marconi Wireless Tel. Co. v. Nat. E. S. Co., 206 Fed. 295, 298, 299 49
Marion & Eastern R. R. Co. v. Mo. Pac. Ry. Co., et al., 318 Ill. 436 (149 N. E., 492) 38
Meyer v. Harris, 38 Atl. Rep. 690 62
Missouri Pac. Ry. Co. v. Chi., R. I. & P. Ry. Co., 41 F. (2d) 188 38
Moore v. N. Y. Cotton Exchange, 270 U. S. 593, 609, 610 48
Motor Bus & Motor Truck Operation, 140 I. C. C. 685, 729 22
McNulta v. Lockridge, 141 U. S. 327 61

National Dock & Storage Whse. Co. v. B. & M. R. Co., 38 I. C. C. 643, 650 24
New England Divisions Case, 261 U. S. 184 41
N. Y. C. & H. R. R. Co. v. I. C. C., 168 Fed. 131, 138 30
N. Y. Dock Ry. v. B. & O. R. R. Co., 73 I. C. C. 656 23

Operation of Line by Atchison, Topeka & S. F. Ry., 94 I. C. C. 318 34
Operation by Los Angeles & St. L. R., 124 I. C. C. 207, 209, 210, 211 39

People v. Joline, 121 N. Y. Sup. 857 62
Pittsburg & West Va. Ry. Co. v. U. S., 281 U. S. 479 59
Prosperity Co. v. Am. Laundry Mach. Co., 6 F. S. 515 50

R. R. Com. v. Ala. Grt. Sou. R. R., et al., 64 So. 13 63
R. R. Com. v. So. Pac. R. R., 264 U. S. 331 34
Rhodes, etc. Mfg. Co. v. International Ticket Scale Corp., 57 Fed. (2d) 713 50
Royal Tr. Co. v. Washburn, B. & I. R. Co., 139 Fed. 865 (reversing 113 Fed. 531) 61

Seaboard Air line Ry. v. Tampa Sou. R. Co., 97 Fla. 340, (121 So. 477) 38
Smith v. Wilson, 273 U. S. 388 56
Southern Pac. Co. v. I. C. C., 200 U. S. 536, 556, 557 29
St. Louis, S. W. R. Co., v. Mo. Pac. R. R. Co., 289 U. S. 76, 82 32
Stratton v. St. L., S. W. Ry. Co., 282 U. S. 10 56
Switching Absorptions, 47 I. C. C. 583 24

Tariffs Embracing Motor Truck or Wagon Transfer Service, 91 I. C. C., 539, 546, 548, 549 22
Tennessee Products Co. v. Warner, 39 F. (2d) 200 52
Texas Co. v. Borne-Scrymser Co., 68 F. (2d) 104 ..... 49, 50
Texas, etc. Ry. Co. v. Johnson, 151 U. S. 81 61

CASES CITED—(Continued)

	Page
Texas & Pac. Ry. Co. v. Gulf, Colorado & S. F. Ry. Co., 270 U. S. 266, 278	32, 37, 40
Transit Commission v. U. S., 289 U. S. 121, 128, 129	34
United States v. Idaho, 298 U. S. 105	39
United States v. Reese, 166 Fed. 347, 350	58
Utica Traffic Bureau v. N. Y., O. & W. Ry. Co., 18 I. C. C. 168, 171	24
Venner v. Denver Union Water Co., 90 Pac. 623, 633	67
Virginian Ry. Co. v. U. S., 272 U. S. 658, 665, 666	29
Wallower, et al. v. U. S., 32 F. (2d) 524, 529	29, 41
Wire Wheel Corp. v. Budd Wheel Co., 288 Fed. 308	49
Wylie v. Northern R. R. Co., 11 I. C. C. 145	23

STATUTES CITED AND COPIED IN THE APPENDIX

	Page
Act to Regulate Commerce, §1 (6); Improper practices declared unlawful	vi
Act to Regulate Commerce, §1 (18), (20), and (22); Certificate of Public Convenience and Necessity	i, ii
Act to Regulate Commerce, §3 (1); undue preference and advantage	v
Act to Regulate Commerce, §6 (1), (4), (7); filing of tariffs	ii, iii
Act to Regulate Commerce, §12 (1); power of Commission to enforce Act	iii
Act to Regulate Commerce, §13 (2); power of the Commission to enforce its orders	iv
Act to Regulate Commerce, §15 (1); cease and desist order	v
Act to Regulate Commerce, §15 (7); investigation of new rates of its own motion	v
Act to Regulate Commerce, §15a (2); rates to yield fair return on value	vi
Act to Regulate Commerce, §16 (12); power of Commission to enforce its orders	iv
Act to Regulate Commerce, §20 (9); power of Commission to enforce Act through Court	iv
Elkins Act, Section 1; Rebating forbidden	vi
Emergency Railroad Transportation Act 1933, §4, (48 Stat. 211); Undue impairment of net earnings	vii
Equity Rule 30	i
U. S. C. A., Title 28, §41 (28), §46; Jurisdiction of U. S. District Court	vii
U. S. C. A., Title 28, §45a; United States party-defendant in suits against Commission - Intervention of parties	ix
U. S. C. A., Title 28, §47; Injunctions as to orders of Commission - Appeal to Supreme Court	vii
U. S. C. A., Title 28, §48; United States Party-defendant in suits against Commission - Intervention of parties	ix
U. S. C. A., Title 28, §125; Suits against Receivers without leave of Court	x

IN THE

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RECEIVERS OF SEABOARD AIR LINE

RAILWAY COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

Appellees.

STATEMENT OF THE CASE.

Fort Benning is a military reservation of about 98,000 acres. The inhabited portion of the reservation is about 10 miles from Columbus, Georgia. It is the seat of the Infantry and Tank Schools of the Army and has a population of approximately 7,500. (R. 221, 229, 11).

Seaboard Air Line Railway and Central of Georgia Railway cross each other at a point known as Fort Benning Junction 6.8 miles from the inhabited portion of the reservation which is known as Fort Benning. Fort Benning Junction is 4 miles southwest from Columbus. The line of railroad which extends from

railroad as a common carrier, and that when the Fort Benning Railroad should be authorized to function as a common carrier Page and Harris would use their best endeavors to make the rates to and from Fort Benning as low or lower than the rates theretofore applied to and from Fort Benning Junction, and until this arrangement could be accomplished, the War Department would pay to Page and Harris $5.00 per loaded car for their services between Fort Benning and the Junction. Under this contract the Government further agreed to pay Page and Harris $1,000.00 per month to do the intra reservation switching at the Fort.

The scheme evidenced by these two contracts was that the Government would eliminate the arbitraries between Fort Benning and Fort Benning Junction, and that Page and Harris would compensate themselves for their services in hauling the traffic between Fort Benning and Fort Benning Junction and for maintaining the Railroad by procuring a division from the main line carriers of the through rates to and from Fort Benning Junction. In order to make this scheme practicable and workable, it was necessary to get the cooperation of one of the main line carriers. The Receivers of the Seaboard fell in with the plan and Charles R. Capps, Chief Traffic Officer of the Receivers of the Seaboard agreed with Page and Harris that when the Fort Benning Line acquired a common carrier status the Receivers of the Seaboard would join with it in making the rates to and from Fort Benning proper the same as to and from Fort Benning Junction, and thus the War Department would be relieved from paying the arbitraries between the Junction and the Fort; and at the same time it was agreed that the Seaboard would concede to the Fort Benning Line on coal a division of fifty cents out of the rate of $1.42 and on refined petroleum products from

[illegible] annuals on third [illegible] and that [illegible] divisions could be made on other commodities [illegible]

Page and Harris in accordance with the provisions [illegible] entered with the Government proposed a charter [illegible] the laws of the State of Texas for the Red Rooming [illegible] company [illegible] and in the name of this [illegible] application was made to the Interstate [illegible] Certificate of Public Convenience and Necessity to operate the Red Rooming [illegible] This application is known [illegible] and a certified copy of [illegible] proceedings in this proceeding is contained [illegible]

[illegible] Railway Company and H. H. [illegible] Texarkana appeared before the Commission [illegible] to the granting of the certificate [illegible] Texarkana Railroad Company [illegible] [illegible] the Texarkana while technically not [illegible] before the Commission supported the [illegible] Railroad before the Commission [illegible] of their Chief Traffic Officer and [illegible] Railroad had previously agreed [illegible] Harris upon the divisions which would [illegible] through traffic if the certificate

[illegible] the application of Red Rooming [illegible] Company for the Certificate of Public [illegible] Necessity on October 4, 1938. R. [illegible] the Certificate was put on the [illegible] Red Rooming Railroad Company was [illegible] common carrier, the revenues of [illegible] would be seriously depleted. R. [illegible] for the benefit of the War Department [illegible] that Page and Harris, although

they had no substantial investment in the property and estimated that their common carrier earnings would be about $40,000 per annum for the short movement between the reservation and the Junction (R. 200), all of which would come out of the pockets of the distributing agencies if the Certificate should be granted.

The Fort Benning Railroad Company applied for a rehearing November 10, 1939, which was denied by the Commission December 11, 1939 (R. 208).

In order to circumvent the decision of the Commission in the Fort Benning case, the Executive of the Seaboard filed their so-called Reciprocal Switch Tariff November 13, 1939, effective December 4, 1939 (R. 29 A), which reads as follows: "Switching at Fort Benning Junction, Ga. Reciprocal Switching at Fort Benning Junction, Ga., switching [illegible] the receiving and delivering tracks of the Fort Benning Military Post."

February 20, 1934, R. D. Pollard, Executive of the Central, brought his complaint before the Interstate Commerce Commission against the Executive of the Seaboard and Page and Harris and prayed [illegible] the above state switching tariff of the Executive of the Seaboard may be declared unlawful [illegible] and that the Executive be required to establish [illegible] Page and Harris were exercising for Fort Benning [illegible] contrary to the order of the Commission in Docket 27709, and that they be ordered to cease and desist therefrom. (8) That the Commission will find and adjudge that the arrangements between the Executive of the Seaboard and Page and Harris constitute a plan or device to evade and set at naught the said order of the Commission. (9) That the Commission will investigate the relations between the Executive of the Department of War Department, and Page and Harris with reference

to the operation of the Fort Benning Line; (5) other and further relief as might be proper in the premises. This proceeding before the Commission is known as "Docket 26483" (R. 84-181).

There should be considered in connection with the Switching Tariff of the Receivers of the Seaboard, an Agreement dated June 7, 1934, between the Receivers of the Seaboard and Page and Harris (R. 21). In this agreement Page and Harris agree to switch over the Fort Benning Line all traffic moving via the Seaboard, and in this matter to act as the Agent of the Receivers of the Seaboard and to comply with all tariffs, laws, rules and regulations to which the Receivers would be subject if they were performing such services; the compensation to be paid to Page and Harris by the Receivers of the Seaboard being $12.50 per car in either direction (excepting empties), but if the revenue of the Receivers from any carload is less than $25.00 the compensation to Page and Harris is to be 50% of the gross revenue of the Receivers from such carload. This contract provides in the 13th paragraph that it "shall be retroactive and shall be in force and effect from and after December 4, 1933," which is the date when the switching tariff went into effect. As a matter of fact the Receivers of the Seaborad from the time this switching tariff went into effect absorbed the $12.50 per car for the transportation between the Fort and the Junction (R. 113). The obvious effect of these arrangements was that the Fort Benning Line was doing the very thing which the Commission decided in Finance Docket 9709 was contrary to the public interest. The War Department acquiesced in and encouraged the efforts to set at naught the decision of the Commission.

As bearing further upon the plan to circumvent the order of the Commission denying the Fort Benning

line common carrier status, attention is called to the following facts:

(1). December 21, 1933, Page and Harris wrote a letter to the Quartermaster at Fort Benning that they proposed to charge shippers of commercial freight over the Fort Benning Railroad $12.50 per car. This was entirely unauthorized by the contracts between Page and Harris and the War Department. The Commandant at Fort Benning forwarded the announcement to the War Department and endorsed on it: "It is recommended that sympathetic consideration be given to the announced intention of the Fort Benning Railroad to make such a charge and to take such measures for relief as may be legal and just" and this recommendation was approved by the Quartermaster General. (R. 173, Exhibit 45.)

(2). January 4, 1934, Page and Harris issued a circular (R. 81, 176) that they were not operating the Fort Benning Line as a common carrier but entirely as private contractors, and that they would charge $12.50 per car for all cars transported between the Junction and the Fort-manufacturing establishments of Georgia, and for less than carload lots under 10,000 pounds, 12½ cents per hundred pounds with a minimum charge of 25 cents for any lot. The circular did not state that the charge of Page and Harris would be on traffic moving by the Seaboard, except that there would be a charge of $5.00 per car from the "Receiving and Delivery tracks" at the Fort to any existing location. The reason for this was that Page and Harris were being paid by the Receivers of the Seaboard $12.50 for all Seaboard traffic moving between the Junction and the Fort and shippers via the Seaboard were relieved of this charge. R. 118, 119.

3. January 11, 1934, Page and Harris forwarded to the War Department a proposed supplement to their

4. The hearing on the complaint of the Receivers of the Central against the tariff of the Receivers of the Seaboard was had before the Director of Service of the Commission June 14, 1904 (R. 21). June 8, 1904, Harry H. Woodring, Acting Secretary of War, wrote a letter to the Chairman of the Interstate Commerce Commission, in which he stated: "From all available information, it is believed that the complaint of the Central of Georgia Railway Company is without merit, and that the evidence which will be produced at the hearing at Atlanta, Georgia, on June 14, 1904, will urge the conclusion that the present switching arrangements at Fort Benning should not be disturbed." (Exhibit 44, R. 176.)

The result of the application of the tariff of the Receivers of the Seaboard and their arrangements with Page and Harris is that on all freight moving via the Seaboard and destined to or originating at Fort Benning the Receivers of the Seaboard absorb, and pay to Page and Harris $12.50 per car, or one-half of their revenue if the revenue is less than $25.00, and shippers of such freight are relieved from paying such charges of Page and Harris, whereas on the other hand, shippers of traffic via the Central of Georgia destined to or originating at Fort Benning must pay to Page and Harris $12.50 per car. The effect of this is that on all commercial freight destined to or originating at Fort Benning that is competitive between the Seaboard and the Central, the shipper pays $12.50 less if his shipment moves via the Seaboard than if his shipment moves via the Central. The amount of freight so affected is very large and has been abnormally large ever since the Seaboard's tariff has been in effect, on account of the large amount of construction work in progress at Fort Benning. (R. 12.)

The revenue which Page and Harris receive from the transportation of freight over the Fort Benning lines goes into their own pockets and is not accounted for by them to the Government. The provision of the contract between Page and Harris and the Government, whereby Page and Harris were to be paid $5.00 per car by the War Department for all freight transported by them between Fort Benning Junction and the Fort, has been entirely departed from.

Shortly after the tariff of the Receivers of the Seaboard went into effect, the War Department advised the Receiver of the Central of Georgia Railway that the Receivers of the Seaboard were absorbing as to traffic moving via the Seaboard, the charges of Page and Harris on all Government freight moving between Fort Benning Junction and the Fort, and that unless the Receiver of the Central of Georgia Railway was prepared likewise to absorb the charges of Page and Harris on Government freight, that the War Department would not route any of its Fort Benning freight via the Central of Georgia Railway, and in consequence of this threat on the part of the War Department, and in order to participate in the hauling of the Fort Benning Government freight, the Receiver of the Central of Georgia Railway was compelled to pay to Page and Harris $12.50 on all Government freight moving in car load lots and one half of its revenue if the revenue was less than $25.00. The War Department sought to apply this arrangement also to traffic moving on commercial bills of lading consigned to the Government at Fort Benning, but on the insistence of the Receiver of the Central of Georgia Railway, that he could not lawfully absorb Page and Harris' charges on this class of traffic, the War Department finally conceded the contention of the Receiver of the Central of Georgia

in this matter and the Central does not absorb any charges of Page and Harris on traffic moving on commercial bills of lading consigned to the Government, but the Government pays Page and Harris $5.00 per car for handling such traffic (Exhibit 1 21, R. 141 155). The Receiver of the Central can lawfully absorb Page and Harris' charges on strictly Government freight under the provisions of paragraph 1 of §22 of the Interstate Commerce Act which authorizes transportation for the Government at free or reduced rates.

After hearing the complaint of the Receiver of the Central against the Receivers of the Seaboard and Page and Harris, the Interstate Commerce Commission passed its order dated February 5, 1935, holding the switching tariff of the Receivers unlawful and ordering it stricken from the files of the Commission. (R. 19.)

The Receivers of the Seaboard then brought their bill of complaint against the United States of America to annul and set aside the order of the Commission of February 5, 1935. (R. 1.)

A court of three Judges was convened to hear the complaint, consisting of Honorable Samuel H. Sibley, Circuit Judge, Honorable William H. Barrett, District Judge and Honorable Bascom S. Deaver, District Judge. (R. 40.)

The Interstate Commerce Commission and H. D. Pollard as Receiver of Central of Georgia Railway Company entered their appearances as Defendants in accordance with Section 212 and 213 of the Judicial Code. (R. 44, 48.)

The United States demurred to the bill and also filed an answer. (R. 41.) The Interstate Commerce Commission answered the bill (R. 43). H. D. Pollard as Receiver of the Central filed an answer to the bill and

counter claim (R. 40). The Receivers of the Seaboard moved to strike the counter claim of H. H. Dollard, Receiver (R. 40).

The cases having come on to be heard before the District Judge, it was agreed by counsel that the motion to strike out the counter claim should not be granted at once, but that it was agreed between the parties that the hearing should be both on the merits and final and that the Court should render a final decree in the case (R. 291).

The Receivers of the Seaboard plaintiff in the main suit presented an answer to the counter claim of the Defendant H. H. Dollard, Receiver, without prejudice to their motion to strike the counter claim, and it was agreed that the Court would consider the main case, the counter claim and the motion to strike the counter claim together and that the evidence introduced before the Master would be applicable to the counter claim as well as the main case (R. 291).

[illegible] the Judges (Judges Barrett and Deaver) [illegible] the report of the Commission of February 5, 1923, sustaining the switching tariff of the Receivers of the Seaboard was lawful and valid, and granted an injunction against the counter claim of the Receivers of the Seaboard (R. 82).

[illegible] reversed, holding that the order of the Commission was not supported by the facts found by it, and it is further held that the counter claim be dismissed (R. 339).

The Receivers of the Seaboard have appealed to this Court from the order of the District Court, sustaining the validity of the said order of the Commission, and the Receivers of the Seaboard on the counter claim.

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I.

THE DENIAL BY THE COMMISSION IN FINANCE DOCKET 9709 OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO FORT BENNING RAILROAD COMPANY.

The decision of the Commission in Finance Docket 9709 (193 I. C. C. 223; 193 I. C. C. 517; (R. 220, 229) turns on the facts that Page and Harris had practically no investment in the Fort Benning Railroad and that they were proposing to use the Fort Benning Line as a means to cut the rates of the main line carriers, so that the Government would get its freight hauled from Fort Benning Junction to the Fort for nothing, and that through the means of divisions out of the through rates, Page and Harris would enrich themselves out of the pockets of the main line carriers. The Seaboard, while technically not parties to this proceeding before the Commission, were privies to the proceeding. Without the agreement of the Seaboard to a division of the through rates, the whole scheme would have been abortive. The Chief Traffic Officer of the Seaboard was the principal witness for the Applicant before the Commission.

II.

THE DECISION OF THE COMMISSION IN DOCKET 26483 STRIKING THE TARIFF OF THE SEABOARD FROM ITS FILES.

This decision is reported in 206 I. C. C. 362 and also is copied in the Record (R. 9).

While the Commission held that the Seaboard was operating over the Fort Benning line as a common carrier without any Certificate of Public Convenience and Necessity contrary to Section 1 (18) of the Interstate Commerce Act, the Commission did not rest its

decision on this proposition. The basis of the decision of the Commission is contained in these extracts from its report:

"(1). Consideration has been given to the contention of the parties, but the tariff is unlawful on other grounds * * *. By the tariff under consideration the Seaboard undertook to extend the switching district of Fort Benning Junction to include the receiving and delivery tracks at Fort Benning. A carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be served by other common carriers through switching arrangements or otherwise";

"(2). Our finding of unlawfulness of the tariff here under consideration, therefore, is not predicated on the fact that the Seaboard has violated Section 1 (18), but rather on the fact that it has published rates to and from Fort Benning, a station not on its line and which cannot be reached by it or any other common carrier, and consequently it cannot pay out of its line haul rates for a service which it is not legally obligated to perform and which it cannot perform, except through the employment of the Contractors with the Government. A remedy for a violation of Section 1 (18) is provided under Section 1 (20)."

"(3). Upon consideration of the record, we find that the Seaboard tariff which extends the Fort Benning Junction switching district to include the receiving and delivery tracks at Fort Benning is unlawful in violation of Section 6 of the Act and should be stricken from the files of the Commission."

We contend elsewhere in this brief that the tariff of the Seaboard was an unlawful tariff also because

through the tariff the Seaboard was violating Section 1 (18) of the Act. But, for the present, we maintain that the decision of the Commission that the tariff was a violation of Section 6 of the Act is fully supported by the law and the facts.

The Appellants complain that the Commission did not specify what portion of Section 6 of the Act was violated; that this Section contains 13 paragraphs. It is obvious from what the Commission said in connection with its statement that the tariff was a violation of Section 6, that it necessarily referred to paragraphs 1, 4, and 7, of Section 6, because all the other paragraphs of Section 6 of the Act are totally irrelevant.

With reference to the contention of Appellants that the Commission is without power under the Interstate Commerce Act to strike the tariff from its files, it seems to us that there is nothing substantial in this point. The Commission in its order pronounced the tariff unlawful, and then followed this portion of its order with the provision that the tariff should be "stricken from the files of this Commission." The order of the Commission pronouncing the tariff unlawful, killed the tariff. The Seaboard could not use the order any further after it was declared unlawful. The Commission has power under Section 15 (7) of the Act to investigate the unlawfulness of the rate, and under Section 15 (1) of the Act it can pass a cease and desist order, and under Section 1 (6) of the Act every unjust and unreasonable practice is prohibited and declared unlawful. In view of the undoubted power of the Commission, it seems to us that it was appropriate to order the tariff stricken from the files of the Commission.

III.

SECTION 6 OF THE ACT TO REGULATE COMMERCE.

The applicable portions of this Section are as follows:

Section 6 (1). "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all of the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid the separate rates, fares, and charges applied to the through transportation."

Section 6 (3). "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such concurrences or rejections with reference thereto as may be required from time to time by the Commission."

Section 6 (7). "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property as defined in this Act unless the rates, fares and charges upon which the same are based have been filed and published in accordance with the provisions of this Act," etc.

Three principles are inherent in the above quoted provisions of Section 6 of the Act.

1. Carriers subject to the Act must file tariffs covering any transportation in which they engage. A carrier which is not subject to the Act cannot file a tariff with the Commission. This is manifestly so because the Commission has no control over carriers not subject to the Act.

2. It follows from the first proposition that a carrier subject to the Act cannot enter into joint or through arrangements with a carrier not subject to the Act, because the Commission would have no control over the rates of the carrier not subject to the Act.

3. A carrier subject to the Act cannot absorb the charges of the carrier with which it connects, which latter carrier is not subject to the Act, for two reasons: first, because the absorption would be a departure from the only tariff which could be lawfully filed, and secondly, if the absorption could be made it would be equivalent to making through rates and joint arrangements with a non-common carrier.

IV.

THE SERVICE PERFORMED BY PAGE AND HARRIS IN CONJUNCTION WITH THE TARIFF OF THE SP. BOARD IS NOT SWITCHING SERVICE BUT LINE HAUL SERVICE, AND PAGE AND HARRIS ARE NOT COMMON CARRIERS SUBJECT TO THE ACT.

Both the Commission and the District Court found that the transportation between Fort Benning and Fort Benning Junction was a line haul service and not mere switching service. The Commission found (R. 14):

> "We are of the opinion and find that the operation of the line between Fort Benning Junction and Fort Benning falls under the provisions of Section 1 (18) of the Act and that before the Seaboard could lawfully operate the line in question a Certi-

rate of Conveyance and Necessity would first have to be obtained.

The District Court found (R. 333):

"The Port Benning Line was organized by Hugo and Harris not as a common carrier but as a contractual carrier or cut off of one of the lines of railroad. The line from Port Benning [illegible] Port Benning is not a spur, industrial switching or side track as defined in Section 1 (22), of the Interstate Commerce Act. The [illegible] Port Benning is a line haul [illegible] the Southern [illegible] operate, and is [illegible] tariff as a line haul carrier.

The [illegible] Port Benning [illegible] and from [illegible] in the [illegible]

The Court [illegible]

"[illegible] Harris [illegible] that [illegible] Port Benning [illegible] being [illegible] line haul [illegible]

We submit [illegible] which [illegible] lawfully [illegible] ning Line [illegible] Benning Line [illegible] ing Line.

There [illegible] mon carrier [illegible] charges [illegible]

to perform terminal services for them. But these cases all relate to a situation where a carrier subject to the Act is required under the law to perform such services and where they are in truth and in fact switching or terminal services. There is no purpose in this case that the Seaboard is under any obligation to carry over the Fort Benning Line. It is like cases at Fort Benning Junction. Moreover the services which the Seaboard is performing through their agents Page and Harris over the Fort Benning Line are not switching or terminal services and both the Commission and the District Court have so found.

Judge Sibley in his dissenting opinion in the Dist ict Court said, referring to the statement of the Interstate Commerce Commission (R. 2401):

> "The statement that a carrier has no right by tariff to include within the switching district tracks over which the carrier has no right to operate as a common carrier, or which cannot be used by other common carriers through switching movements, or otherwise will not support the order. The first clause is bad in law, for carriers daily and everywhere switch over privately owned tracks. If they are going to do so, the Act merely requires that the shall tariff to state with the charge to be made for the service. The last clause is also wrong in fact, for the proof and the finding of the Commission are that the other common carrier, the Central, can if it wishes make the same switching arrangements which the Seaboard has."

The passage from the report of the Commission quoted by Judge Sibley must be taken in connection with what the Commission had previously said, which was to the effect that the haul over the line from Fort Benning Junction to Fort Benning was not switching

service but was a line boat was for and that the Post was not a terminal of the Steamboat & service as frequently quite were privately owned trucks but they only de as within their terminal delivery district they do not see any reference in the last stated by the District Judge that the Central could have made the same switching arrangements with Page and Hanson that the Steamboat had made. It could not have been fully done we may more that the Steamboat could have done so. The point is that the Steamboat switching arrangements were unlawful

7.

PAGE AND HARRIS WAS BEING A COMMON CARRIER SUBJECT TO THE I.C. THE CENTRAL DID NOT LAWFULLY AND REASONABLY REFUSE TO MAKE JOINT RATES OR THROUGH ROUTES WITH PAGE AND HARRIS BECAUSE THEY WERE NOT SUBJECT TO THE I.C.

The Commission has expressed no opinion as to the question whether the Central was under a duty to establish joint rates and through routes with Page and Harris. The Commission has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. It has not found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. It has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. (1) It has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. (2) It has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. (3) It has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. The Commission has found that the Central refused to establish joint rates and through routes with Page and Harris because they were not subject to the Act to regulate commerce. It

any joint rates or through arrangements or absorptions with carriers not subject to the Act.

> Tariffs Embracing Motor Truck or Wagon Transfer Service, 91 I. C. C. 539, 546, 548, 549.

The Commission reaffirmed its decision in the above case and said (referring to the above case):

> "In that case we held that we have no jurisdiction over service by a motor carrier which extends beyond terminal districts and becomes what is commonly designated as a line-haul and in effect acts as an extension of the lines of rail or water carriers. We also held that where a motor carrier performs a line-haul service it is not a proper party to a joint tariff and that joint rates cannot be made between such motor carrier and carriers subject to the act."

> Motor Bus and Motor Truck Operation, 140 I. C. C. 685, 729.

Southwest Missouri Railroad published a tariff absorbing drayage charges on ore from the mines to its line. This absorption was paid for the purpose of diverting the ore from the lines of the Miami Mineral Belt and Northeast Oklahoma Railroad which were nearer the mines. The Commission held that this tariff was nothing more or less than a rebate to the shippers although it was paid direct to the teamsters. The tariff was otherwise in violation of Section 6 of the Act.

> Drayage Absorptions by S. W. M. R. Co., 113 I. C. C. 179.

Northern Pacific Railway Company entered into through arrangements with a stage transportation company and a hotel association, with reference to passengers going to the Yellowstone National Park. The Commission held:

"That the defendant railway company, stage transportation company, and hotel association, are not competent in law to form through routes and establish joint rates as provided in section 6 of the act to regulate commerce, and the circular or tariff under which the rates and tickets in question are provided cannot be regarded as a joint tariff established by connecting carriers under that Act."

Wylie v. Northern P. R. Co., 11 I. C. C. 145.

The New York Dock Railway was a common carrier under the Act and operated 10.62 miles of track on the Brooklyn water front. The New York Dock Railway petitioned the Commission to grant it a larger division out of the through rates than it was enjoying. The Commission found that the Dock Railway was not a party to the joint rates, but that the Dock Railway received a certain amount from the trunk lines for the services performed by it, which amount was deducted from the through rate before prorating, the balance being divided among the other interested carriers on the basis of their established divisions. On this state of facts the Commission held:

"As hereinbefore noted, the trunk lines provide for allowances to the dock company for services performed by the dock railway. The amounts, however, actually are paid to the dock railway. The trunk lines are therefore publishing rates to and from stations which are not on their lines and which cannot be reached by any line which is a party to their tariffs or by any carrier to which an allowance for service beyond the eastern termini of the trunk lines is lawfully provided. Obviously this is in violation of the requirments of the law and our regulatons with respect to the publication of rate schedules."

N. Y. Dock Ry. v. B. & O. R. R. Co., 73 I. C. C. 656.

VI.

THE PRACTICAL EFFECT OF THE SEABOARD'S SWITCHING TARIFF IS THAT THE SEABOARD MAKES THROUGH RATES TO FORT BENNING PROPER.

The shipper under this arrangement gets his traffic to Fort Benning proper and pays only the rates established by the Seaboard tariffs up to Fort Benning Junction. The $42.50 per car charged by the Fort Benning line is absorbed by the Seaboard and through its switching tariff the Seaboard has the traffic delivered at Fort Benning proper on the the Fort Benning Junction rate.

> "It seems plain to us that the tariffs above mentioned, the joint tariff of the line carriers and the switching tariff of the defendant, are to be taken and read together; they are intended to supplement each other and their practical and legal effect is the same as one publication naming the aggregate rate from the Lehigh coal field to industries in Utica on the tracks of the Ontario & Western."
>
> Utica Traffic Bureau v. N. Y., O. & W. Ry. Co., 18 I. C. C. 168, 171.
>
> "So far as the shipping public is concerned the effect of a switching absorption is to establish a joint rate."
>
> Butterfield Co. v. N. O. & N. E. R. Co., 55 I. C. C. 741, 743.
>
> "So far as the shipping public is concerned the effect of a switching absorption is to establish a joint rate; the cancellation of an absorption is the withdrawal of a joint rate, leaving effective the higher aggregate of intermediate rates."
>
> National Dock & Storage Whse. Co. v. B. & M. R. Co., 38 I. C. C. 643, 650.
>
> See also:
> Switching Absorptions, 47 I. C. C. 583.

VII.

THE SEABOARD COULD NOT LAWFULLY ABSORB THE LINE HAUL CHARGES OF ANOTHER CARRIER. THE ESTABLISHMENT OF THROUGH RATES IN THIS MANNER IS UNLAWFUL.

Even assuming that the Fort Benning line is a carrier subject to the Act (which it clearly is not), the Seaboard could not absorb the local transportation charges of the Fort Benning line because the service which the Fort Benning line is performing is not switching or terminal service. The service is line-haul service.

> "While it is proper for the line-haul carrier to absorb the terminal or switching charges of a connecting line it may not absorb its local transportation charges in the manner indicated above."

Chestnut Ridge Ry. Case, 37 I. C. C. 558, 562.

To the same effect, see:

Atlantic Refining Co. v. Director Gen., 64 I. C. C. 61.

The Stony Fork Branch of the L. & N. Railroad runs from Stony Fork, where it connects with the Southern Railroad, a distance of 8.98 miles. A dispute arose between the Southern Railway and the L. & N. as to which one should furnish cars for the coal traffic originated on the Stony Fork Branch. The L. & N. proposed to cancel joint rates on coal from points on the Stony Fork Branch of the L. & N. Railroad to Southeastern territory and to substitute in the place thereof switching rates, which switching rates the Southern Railway proposed to absorb. The Commission held:

> "The method of publishing rates from the Stony Fork Branch to the southeast, as proposed in suspended schedules, would, under the circumstances

of this case, be improper. This is evident when we consider that the movement from Stony Fork Branch mines to Middlesboro is not a switching movement and that consequently the charge of the Louisville & Nashville is not such as may be properly absorbed by the Southern."

"There is no provision in the law for the establishment of through rates by absorbing the local rates of another carrier for the purpose of establishing through rates over a through route composed of two or more carriers over which through route no joint rate has been fixed by the agreement."

Coal Rates on the Stony Fork Branch, 26 I. C. C. 168.

The Great Northern refused to join in joint passenger rates with the C. M. & St. P. via Seattle. To off-set this disadvantage, the Milwaukee Company published a tariff, whereby it absorbed the rates paid by passengers travelling over the Great Northern to Seattle and thence from Seattle over the Milwaukee line. The Commission held that one carrier could not absorb a part of another carrier's charges, referring to its decision in coal rates on Stony Fork Branch, 26 I. C. C. 168, 173, and then the Commission said:

"There is no specific inhibition in the law against such absorptions, but tariff provisions and the practices thereunder must conform to the requirements of section 6 of the act and of the regulations which we are authorized to make thereunder. Such regulations are designed, among other things, to insure that tariffs shall state in specific, clear, and unambiguous terms the rates and fares and their application. The character of the provision which the Milwaukee has caused to be inserted in the tariffs, over the objection of the Great Northern, and the ob-

vious difficulty of conforming it to the strict requirements of the statute and our regulations, must lead to its condemnation."

C. M. & St. P. Ry. v. G. N. Ry. Co., 49 I. C. C. 302, 305, 306.

The Danville, Urbana & Champaign Railroad published a switching rate from Danville to Bronson, a distance of 8.9 miles, Bronson being the junction with the C. & E. I. Railroad. The C. & E. I. Railroad published a tariff providing for the absorption of the switching charge of the D. U. & C. The Commission held that although the charge was published as a switching charge, the transportation which the D., U. & C. rendered from Danville to Bronson was, in fact, a line-haul service, and, therefore, it could not be absorbed by the C. & E. I.

Commodity Rates on Brick from Danville to Bronson, 63 I. C. C. 277.

The Ligonier Valley Railroad extends from Ligonier, Pa., to Latrobe, where it connects with the Pennsylvania. It was held that the haul from Ligonier to Latrobe was a line-haul and not a switching movement, and that the absorption of the charges of the Ligonier Valley by the Pennsylvania was an *improper method of tariff publication.*

Barrett Co. v. D. G., 88 I. C. C., 535, 539, 540.

VIII.

THE APPROVAL BY THE WAR DEPARTMENT OF THE CONTRACT OF JUNE 7, 1934, DID NOT GIVE THE SEABOARD ANY RIGHT TO OPERATE OVER THE FORT BENNING LINE.

The approval by the War Department of the contract of June 7, 1934, does not appear in the evidence. It appears in the report of the Commission in Docket No.

26483 (R. 17). From the report of the Commission it will be seen that this approval by the War Department was subsequent to the hearing. The Commission disposed of this so-called approval of the contract as follows:

> "The Seaboard contends that by this endorsement the War Department has given approval to that Company to operate the Fort Benning Line whenever it so desires. We do not so construe it. The endorsement was an approval of the terms of the contract, but granted no rights to the Seaboard to operate over the track in question. Manifestly, the War Department could take no action on a subject-matter which the Congress has placed under our exclusive jurisdiction."

IX.

THE COURT WILL SUSTAIN THE ORDER OF THE COMMISSION, IF VALID FOR ANY REASON.

"In a suit by the Interstate Commerce Commission to enforce an order made by it, the Court is not confined in passing on the validity of the order to the reasons stated by the Commission." (last h. n.).

The Court said on page 556:

"The defendants object that the Circuit Court had no authority to decree the enforcement of the order upon any other ground than that taken by the Commission itself. We think that the Court was not confined to those grounds, and if it found that the rule was, in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held that the rule to be a violation of one section, the order to desist might be valid, if, instead of the section named by the Commission, the Court should find that the

rule was a violation of another section of the act. All of the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. We therefore look to see the ground taken by the Circuit Court."

Southern Pacific Co. v. I. C. C., 200 U. S. 536, 556, 557.

"In suit to enjoin operation of order of Interstate Commerce Commission directing plaintiffs to cancel certain proposed schedules theretofore filed with Commission, court must, if necessary, go behind reasons assigned by Commission or its counsel for making order, and determine for itself validity of order."

Wallower, et al. v. United States, 32 F. (2d) 524, 529.

"This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

Virginian Ry. Co. v. U. S., 272 U. S. 658, 665, 666.

X.

THE COMMISSION IS NOT CONFINED IN MAKING ITS ORDER TO THE CONTENTIONS OF THE PARTIES. ITS ORDER SHOULD HOWEVER BE GERMANE TO THE SUBJECT MATTER RAISED BY THE COMPLAINT.

The Commission has the power to investigate and hear any matter on its own initiative, without any complaint whatever; [Sections 13 (2) and 15 (1) of the Act]. Therefore, if its order relates to the subject matter of the complaint, the only question is whether the order is lawful. The Court is not concerned with the reasons.

Although the order may be technically outside the issues raised by the pleadings, the order is not invalid on that account, if it is germane to the subject matter.

New York Central & H. R. R. Co., v. I. C. C., 168 Fed. 131, 138.

The Appellants complain that the Commission put its order on a different ground from that urged by the Receiver of the Central. The Commission was at liberty to do that. The gravamen of the complaint was that the tariff was unlawful, and the complaint prayed that the relations between Page and Harris and the Seaboard should be investigated, and for such order as the Commission might consider proper in the premises. The complaint was filed shortly after the tariff went into effect and the Complainant had substantially no information as to the relations between Page and Harris and the Seaboard. The contract of June 7, 1934, which set forth the relations between Page and Harris and the Seaboard was not made until a week before the hearing before the Examiner of the Commission, although by the terms of the contract, it was retroactive to the effective date of the tariff.

XI.

THE TARIFF OF THE SEABOARD WAS CONTRARY TO SECTION 1 (18) OF THE ACT AND THE COMMISSION COULD HAVE PUT ITS DECISION ON THIS GROUND, AS WELL AS ON THE VIOLATION OF SECTION 6 OF THE ACT.

The Commission found (R. 14): "We are of the opinion and find that the operation of the line between Fort Benning Junction and Fort Benning falls under the provisions of Section 1 (18) of the Act, and that before the Seaboard could lawfully operate the line in question a certificate of convenience and necessity would first have to be obtained."

The Commission did not rest its decision upon this paragraph of its report, but rested it on Section 6 of the Act:

The Commission should have rested its decision not only on Section 6 of the Act, but also on the ground that the tariff was a violation of Section 1 (18) of the Act.

The proceeding before the Commission involved the legality of a tariff. The Seaboard instead of operating the Fort Benning line, resorted to the device of publishing a tariff extending its switching limits over the Fort Benning Line, and then making a contract with Page and Harris to do the physical switching for the Seaboard. The Commission pronounced this arrangement to be a virtual extension of the Seaboard Line over the Fort Benning Railroad without a certificate contrary to Section 1 (18) of the Act. The tariff is therefore contrary to Section 1 (18) of the Act. This section of the Act provides that "No carrier by railroad subject to the Act shall undertake the extension of its line of railroad * * * until there shall have first been obtained from the Commission a certificate, etc." Section 1 (20) of the Act provides that any carrier which violates Section 1 (18) of the Act shall be fined or imprisoned or both. Under Section 12 (1) of the Act "The Commission is hereby authorized and required to execute and enforce the provisions of this Act." Section 15 (1) of the Act provides, if anything is being done unlawfully and contrary to the Act, the Commission can issue a cease and desist order. Under the decision of the Commission there can be no doubt that the tariff was a violation of Section 1 (18) of the Act, and if the tariff was unlawful and invalid on this ground, the Commission had ample power and authority to rest its decision on this ground.

The Commission has initial and exclusive jurisdiction over tariffs.

> "The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated." (Citing a long line of cases).
>
> Director General of Railroads v. Viscose Co., 254 U. S. 498, 504.

It is apparent from the context of the Commission's report that it did not rest its decision in part on the violation of Section 1 (18) of the Act, because of the decisions of this Court in

> Texas & Pacific Railway Co. v. Gulf, Colorado & Sante Fe Railway Co., 270 U. S. 266.
>
> St. Louis S. W. R. Co. v. Missouri Pac. R. Co., 289 U. S. 76, 82.

These cases hold that where one railroad company has extended its line contrary to the Act, the exclusive remedy of another railroad company which objects, is an injunction under Section 1 (20) of the Act. There is nothing in these cases which militates against the proposition which we urge, that where a railroad company publishes a tariff which is a part of a scheme to extend its line contrary to the Act, that the Commission has power to denounce the tariff as unlawful because it is contrary to the Act in this particular. The Commission would thereby exercise its function, which is primary and exclusive, to deal with tariffs filed under the Act.

XII.

THE SEABOARD BY VIRTUE OF THE SWITCHING TARIFF AND THE CONTRACT OF JUNE 7, 1934, WITH PAGE AND HARRIS HAS EXTENDED ITS LINE OF RAILROAD TO FORT BENNING AND IS OPERATING THE FORT BENNING LINE CONTRARY TO SECTION 1 (18) OF THE ACT.

Section 1 (18) of the Act provides: "No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate, etc."

It will be noted that this section relates not only to the extension of its line of railroad, but to the operation of a line of railroad and the engaging in transportation over such additional or extended line.

The Commission found (R. 13): "The fact that the Seaboard has by the tariff here considered extended its line over the government owned railroad to the fort is not open to question."

The contract of June 7, 1934, taken in connection with the tariff would seem to conclude the question that the Seaboard is operating over the Fort Benning line contrary to Section 1 (18) of the Act.

There are several cases which hold that where one railroad by trackage arrangements or otherwise utilized the line of another railroad, the case is within Section 1 (18) of the Act.

Transit Commission v. U. S., 289 U. S. 121, 128, 129.

Operation of line by Atchison, Topeka & Sante Fe Ry., 94 I. C. C. 318.

Railroad Commission v. Southern Pacific R. R., 264 U. S. 331.

Alabama Ry. v. Jackson Ry., 271 U. S. 244.

XIII.

THE FORT BENNING LINE IS NOT A SPUR, INDUSTRIAL, TEAM OR SIDETRACK WITHIN THE MEANING OF SECTION 1 (22) OF THE ACT.

The Commission found (R. 13, 14), that the case was not within Section 1 (22). The District Court found to the same effect (R. 338).

The evidence amply sustains the finding of the Commission and of the District Court.

(1) Fort Benning is not an industry and may more properly be described as a small city or town. It has a population of between 7500 and 8000, including officers and their families, enlisted men and their families, and civilian employees and their families. The inbound and outbound freight consists of the many articles necessary to the subsistence of the inhabitants and the equipment used in military activities, in addition to a large amount of building material used in connection with erecting permanent buildings. About one-half of the inbound shipments which total approximately 2800 carloads per year, are moved on Government bills of lading, the balance on commercial bills of lading. No industrial operations are conducted within the Reservation. (R. 14.)

(2). There are no stations on the Fort Benning line between the Junction and the Fort proper, (R. 255)

and no passenger business is conducted over this line. (R. 265.) The Central of Georgia, Seaboard, and the Southern Railway compete with each other for the business to and from Fort Benning. (R. 264.)

(3) When the line reaches the Fort there are a number of spur tracks which radiate to different parts of the inhabited portions of the Fort. (R. 221.) When the Central operated the line, intra-reservation switching was done by the War Department (R. 265); and regular line-haul rates were established between Fort Benning Junction and the Fort, which were carried in published tariffs (R. 276). The tariffs are contained in F. D. 9709, Exhibits 16, 17, 18 and 19 (R. 300-318). The rates contained in these tariffs were known as arbitraries (R. 224, 226, 277).

(4) The War Department when it made the contract with Page and Harris had no doubt about the character of the track, because in paragraph 1 of the operating contract between Page and Harris and the War Department it was provided that Page and Harris would organize the Fort Benning Railroad Company and apply to the Commission for a certificate.

(5) The following evidence of Page and Harris and of General Williams of the War Department shows that the service of the Fort Benning line was transportation and not mere switching service and that the switching service was the intra-reservation switching service at the Fort.

Answer 22 to Questionnaire (R. 203), states Fort Benning Line will afford "independent local carrier" service.

Answer 23 to Questionnaire (R. 203):

"This line is not an extension, branch, connecting track or cut off for any other line. It is expected to be directly profitable in itself."

Williams (R. 285):

"Two kinds of railroad service are essential to serve this community; first, between Fort Benning and the outside world; and, second, a local service from point to point within the Reservation."

Williams (R. 280):

"In fact, the Central of Georgia did not perform all of the railroad service, but merely brought the cars in, and it being necessary for the Government to maintain an engine and crew to perform the switching between the points on the Reservation not covered by the Central of Georgia contract."

Page (R. 255):

"The common carrier service between Fort Benning Junction and Fort Benning will consist of main line haul of approximately six miles between Fort Benning Junction and Fort Benning station, and also the customary placement and movement of the cars in common carrier service at the numerous unloading points within the Reservation * * * This is simply the placement which is customary out of line haul rates."

Harris (R. 259):

"Our operation at Fort Benning involves two types of service which can best be described as follows:"

Then the witness describes at great length the line haul service and the intra-reservation service.

(6) Under the contract between Page and Harris and the Government, Page and Harris are paid $1.00

a month to do the intra reservation switching at Fort Benning, and they make a charge of $12.50 to all shippers (except the Government) for hauling traffic between the Junction and the Post and thus distinguish between the line haul and the switching service.

(7) The Seaboard tariff establishes the point at Fort Benning described in the tariff as "switching and delivery track". This indicates where the line haul stops and the switching begins.

(8) The Seaboard tariffs all stop at Fort Benning Junction (R. 99).

The following authorities sustain this point:

"But if the purpose and effect of the new trackage is to extend, substantially, the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of par. 18, although the line is short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (Par. 3)

"In determining what is an extension, the purpose of the Act to develop and maintain an adequate railway system, and thereby to curb wasteful competition and the building of unnecessary lines, is the important guide." (Par. 7)

Texas & Pacific Ry. v. Gulf, C. & S. F. Ry. Co., 270 U. S. 266, 273.

(Reversing the 5th Circuit Court of Appeals in Gulf C. & S. F. Ry. Co. v. Texas & P. Ry. Co., 6 F. (2d) 904, and affirming the decision of the District Court in Lancaster, et al., v. Gulf, C. & S. F. Ry. Co., 292 Fed. 668.

A line 3¾ miles long to state lands owned by a resort company.

Detroit & M. Ry. Co. v. Boyne City, G. & A. R. Co., 286 Fed. 540 (h. n. 2, 3).

A track 3700 feet long to reach a site for a proposed new freight station.

Mo. Pac. Ry. Co. v. Chi., R. I. & P. Ry. Co., 41 Fed. (2d) 188.

A track one mile in length to a coal shaft.

Marion & Eastern R. R. Co. v. Mo. Pac. Ry. Co. et al., 318 Ill. 436, (149 N. E. 402).

A track to be constructed by the Tampa Southern Railroad on a strip of land owned by the City to connect with other tracks previously constructed by the City for the purpose of affording the Tampa Southern Railroad access to water terminals owned by the City and to enable the Tampa Southern to provide transportation facilities for such industries as should be established and located adjacent to this strip of land.

Seaboard Air Line Ry. Co. v. Tampa Sou. R. Co., 97 Fla. 340, (121 So. 477).

The El Dorado and Western Railway proposed to construct a track 1500 feet across four tracks of the C. R. I. & P. Ry. Co. to connect with the track of the Missouri Pacific. The Court held that the purpose being to form a contract with the Missouri Pacific so as to compete with the C. R. I. & P. Railway, the track was not within Section 1 (22) of the Act.

El Dorado & Western Ry. Co. v. C. R. I. & P. Ry. Co., 5 F. (2d) 777.

Los Angeles and Salt Lake Railroad Company made application to the Commission to construct a track 1.87 miles to the plant of the Columbia Steel Company. The

Commission held the track was not within Section 1 (22) because it connected with a plant served by other carriers.

Operation by Los Angeles and S. L. R., 124 I. C. C. 207, 209, 210, 211.

Other typical cases:

Commodity Rates on Brick from Danville to Bronson, 63 I. C. C. 277,

Barrett Co. v. D. C., 88 I. C. C. 535, 539, 540,

Acquisition Iberia and Vermilion R. R., 111 I. C. C. 660.

Atlanta & St. A. B. Ry. Co., Applicant, 71 I. C. C. 784.

The case cited below is not a parallel case. It holds that a track which served a coal mine exclusively was an industrial spur. No competition with other carriers was involved. The track was typically a spur and is easily distinguishable from the case at bar.

U. S. v. Idaho, 298 U. S. 105.

XIV.

THE ORDER OF THE COMMISSION SHOULD BE SUSTAINED ON THE FURTHER GROUND THAT THE SEABOARD TARIFF IS WASTEFUL AND AN IMPROPER PRACTICE.

The Seaboard is absorbing out of its line haul revenue on traffic to and from Fort Benning $12.50 under its switching tariff. The Central either has to meet this competition or not participate in the traffic.

§1 (18) of the Act is designed specially to prevent undue competition. In the following case, which turned

on the grant of a certificate under §1 (18) of the Act, the Court said (p. 277):

> "It recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss."
>
> Texas & Pac. Ry. v. Gulf, etc. Ry., 270 U. S. 266, 277.

Under §1 (6) of the Act "every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful".

Under §15a (2), the Commission is charged with the duty of establishing rates which will "under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

The spirit and purpose of the Interstate Commerce Act is carried forward into the "Emergency Transportation Act 1933," (48 Stat. 212), and is expressed as follows:

> "§4. The purposes of this title are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the

Interstate Commerce Act, as amended, which will * * by control allowances, accessorial services, and the charges therefor, and other practices affecting service or operations, to the end that undue impairment of net earnings may be prevented, and by avoid other wastes and unreasonable expense."

The broad powers of the Commission with respect to rates and practices of the carriers and the procedure thereof and the prevention of undue rates, are set forth in

The New England Divisions Case, 261 U. S. 184.

Daylight Grain Case, 241 U. S. 253, 258.

In the case cited below, a railroad company owned a tariff governing charges from certain points to its lines. The rate issue was between two other railroads. The Commission canceled the tariff. The Court said that the order of the Commission was valid, because the effect of the order was to prevent the diversion of traffic from the railroad and the Commission had the power not only under §15 par. 2 of the Act but also had the power under §1 par. 4 of the Act to prevent undue competition. The order of the Commission was sustained on those grounds although the Commission did not put its order on those grounds.

Wallowa, et al. [illegible] 32 F. 2d 524

The District Court found R. 223 [illegible] another sufficient reason for sustaining the order and ordered in the report of the Commission [illegible] that the tariff unduly impairs the line haul revenue. The Appellants in their statement of points upon which they intend to rely except to this ruling of the District Court and say R.

300). Although the Commission made no finding of such impairment, and there was no evidence whatever before the Commission or the statutory Court which would support such a finding. There is ample evidence in the record to sustain the finding of the impairment of earnings. The District Court quotes in its decision (R. 331, 332) an extract from the second report of the Commission in Finance Docket No. 9700 (R. 230) as follows:

"Estimated earnings of the Fort Benning Railroad would be the equivalent of an average of $13.00 a car for the short movement between the Reservation and the Junction. This revenue would accrue from divisions of joint through rates and therefore would operate as a reduction, *pro tanto*, of the Central's or the Seaboard's revenue for the line haul * * *. Here the Applicant (Fort Benning Railroad) and its sponsors would be the sole beneficiaries of such practices, and at the expense of established carriers whose properties are in receivership". It further appears from Exhibit No. 47 to Docket 26483, (R. 1811), that the Seaboard paid Page and Harris for cars handled over the Fort Benning line from December 1, 1933, to the first half of June, 1934, which is about half a year, the sum of $17,517.15, which is at the rate of about $35,000 a year.

Judge Sibley, in his dissenting opinion, stated (R. 840): "The real objection is that the Seaboard is doing it free. The Commission, perhaps, thinks it unwise or unreasonable that it be done free but it has made no such fact finding. If it had, its order might stand, but cannot stand without it. The fact is of the class peculiarly for determination by the Commission."

We have shown above that the Commission specifically found the fact that the Seaboard was paying over

subject. The New England Divisions case and the Dayton-Goose Creek Railway Company case, cited by the District Court to sustain its findings on this point, were both decided under the Interstate Commerce Act and before The Emergency Railroad Transportation Act was passed.

XV.

THE FINDINGS OF THE COMMISSION IN FINANCE DOCKET NO. 9709 BECAME PART OF ITS FINDINGS IN DOCKET NO. 26483 BY REFERENCE THERETO AND BY VIRTUE OF THE STIPULATION THAT THE RECORD AND EVIDENCE IN THE FORMER DOCKET SHOULD BE CONSIDERED IN THE LATTER.

It appears from the proceedings in Docket 26483 that at the beginning of this proceeding Counsel for the Receiver of the Central offered to introduce in evidence in that proceeding the evidence before the Commission in Docket No. 9709. The introduction of the evidence in Docket No. 9709 was objected to by Counsel for the Seaboard. Director Bartel suggested that Counsel seek to agree later with respect to the matter and reserved his ruling upon the admission of the record (R. 92). Later in the proceeding there appears (R. 109) the following:

> "Mr. Cocke advised the Director that the Respondents withdrew their objections to the introduction of the record in Finance Docket No. 9709 provided that the entire record was placed in evidence, and with that understanding the record in that proceeding was received."

The Commission made two reports in Finance Docket No. 9709. The first report was made by Division No. 4 (R. 220), and the second report was made by the full Commission (R. 229).

The Commission in Docket No. 26483 specifically adopted by reference the findings in Finance Docket No. 9709 in the following language (R. 181, 182.):

> "The first report in the above case (referring to Finance Docket 9709) sets forth pertinent facts of record concerning the nature and extent of the Military Reservation and its rail traffic, the physical relationship of the area to the trunk line, the history of the connecting lines and its operations, the terms of the proposed lease and operating agreement, and the contentions for and against the application. The record in that case was by stipulation made a part of the instant proceeding."

Judge Sibley in his dissenting opinion (R. 339), states in connection with this matter:

> "The putting in evidence of the former proceeding in which Page and Harris were denied a certificate of public convenience did not make the findings in that case findings in this one. The Seaboard Air Line Railway Company and its Receivers were not parties to that proceeding and Page and Harris are not parties to this one."

The other two Judges in the District Courts referring to this contention of Judge Sibley, said (R. 330):

> "There were thus three reports of the Commission upon which the order complained of was founded, it affirmatively appearing that they all were considered by the Commission, and it would have been inexcusable tautology to have repeated findings already made and already a part of the record."

We have shown in a previous part of this brief the fact that although the Receivers of the Seaboard were not parties to Finance Docket No. 9709, that they were privies to it and that they were a part of the plan to

have the Fort Benning Line made a common carrier. Page and Harris were parties to Docket No. 26483. They were named as Respondents in the complaint of H. D. Pollard, Receiver, before the Commission (R. 27, 33).

XVI.

THE COUNTER CLAIM OF THE DEFENDANT, H. D. POLLARD, RECEIVER.

This counter claim is contained in the Answer of H. D. Pollard, Receiver, (R. 40, 84). The counter claim set forth that the Seaboard had no Certificate of Public Convenience from the Commission to operate the Fort Benning Line or to extend its line to Fort Benning, but that the Seaboard through the medium of its switching tariff and the contract of June 7, 1934, with Page and Harris had extended its line to Fort Benning and were operating the Fort Benning Line contrary to §1 (18) of the Act and that, notwithstanding the order of the Commission in Docket 26482, cancelling the switching tariff of the Seaboard, that the Seaboard was still continuing its practices just as though the tariff had not been cancelled by order of the Commission and that its practices continued after this suit was filed to annul the order of the Commission; and on these allegations the counter claim prayed that the Court would grant an injunction against the Seaboard to restrain it from extending its line to Fort Benning and from operating the Fort Benning line without a Certificate, contrary to the provisions of §1 (18) of the Act. The majority of the Court of three Judges granted the injunction on the counter claim and Judge Sibley dissented.

The facts alleged in the counter claim are practically undisputed and where there is any dispute about the facts they are amply sustained by the record.

It was stipulated that the Court should hear the counterclaim with the main case and that the evidence introduced before the Court would be applicable to the counter claim as well as to the main case. (R. 83). It was further stipulated (R. 83, 84) that the Seaboard had not received a Certificate to operate the Fort Benning Line and that after the order of the Interstate Commerce Commission in Docket 26483, the Seaboard maintained its arrangement with Page and Harris, whereby Page and Harris operated the line between Fort Benning Junction and Fort Benning as agents of the Seaboard and compensated Page and Harris for their services.

The Commission had done nothing to make the Seaboard comply with the order cancelling the tariff, and unless the Receiver of the Central could obtain an injunction under his counterclaim, the results of the proceeding before the Commission would have been nugatory.

XVII.

THE COUNTER CLAIM IS FILED IN CONFORMITY WITH EQUITY RULE 30. IT IS EQUITABLE IN CHARACTER. IT ARISES OUT OF THE TRANSACTION WHICH IS THE SUBJECT MATTER OF THE SUIT AND, THEREFORE, MUST BE PLEADED. IF IT AROSE OUT OF AN EXTRANEOUS MATTER, THE EQUITY RULE PERMITS THE COUNTER CLAIM.

Equity Rule 30 2nd paragraph provides:

> "The answer must state in short and simple form any counter claim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set out any set-off or counter claim against the plaintiff, which might be the subject of an independent suit in equity against him, and such set-off or counter claim, so set up, shall

> have the same effect as a cross suit, so as to enable the Court to pronounce a final judgement in the same suit both on the original and cross claims."

The subject matter of the Bill of Complaint is an order of the Commission, which cancels the tariff of the Seaboard under which tariff it was extending its operations over the Fort Benning line. The Seaboard was ignoring the order of the Commission. The counter claim seeks by the process of injunction to prevent the Seaboard from using the tariff as a means of operating over the Fort Benning line contrary to Section 1 (18) of the Act. The counter claim in this case is a typical case for a cross bill under the old practice.

> See especially Moore v. N. Y. Cotton Exchange, 270 U. S. 593, 609, 610.

It does not require any argument to demonstrate that the counter claim is equitable in character. It seeks injunction which remedy can be obtained only in a court of equity. The proceeding by injunction to prevent a violation of Section 1 (18) of the Act is authorized by Section 1 (20) of the Act.

The Equity Rule 30 provides in terms that if the counter claim arises out of the transaction which is the subject matter of the suit, it *must* be set up in the answer. If it does not arise out of the transaction, it *may* be set up in the answer.

The following case holds that the counter claim must be equitable, and that if it arises out of the transaction it *must be* brought forward in the answer, but if it does not arise out of the transaction it may be pleaded in the answer. And in this connection the Court said:

"The rule goes as far as possible to facilitate the prompt disposition of equitable controversies between the same litigants. The rule should be liberally construed to carry out its evident purpose of shortening litigation, but the limitation of counter claims to those which are equitable is imperative."

American Mills v. American Surety Co., 260 U. S. 360.

See also:

Marconi Wireless Telegraph Co. v. Nat. E. S. Co., 206 Fed. 295, 298, 299.

Wire Wheel Corp. v. Budd Wheel Co., 288 Fed. 308.

Texas Co. v. Borne-Scrymser Co., 68 F. (2d) 104.

E. F. Hauserman Co. v. Wright Metal, Inc., 1 F. S. 43.

XVIII.

THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA CAN ENTERTAIN THE COUNTER CLAIM EVEN THOUGH UNDER THE VENUE STATUTES THE PLAINTIFFS MIGHT NOT BE SUABLE IN THAT DISTRICT.

In the case below the defendant filed a counter claim against the plaintiff under Equity Rule 30. The counter claim was not germane to the main case. The plaintiff made the point that not being a resident of the District it was not suable there on the counter-claim. The Court held:

"One who sues in a federal court of equity to enjoin infringement of his patent, thereby submits himself to the jurisdiction of that court with respect to all the issues in the case, including those pertain-

him to a counter claim praying that he be restrained from infringing the like patent of the defendant."

Lamson Register Amold Co. 241 U. S. 149

In the following case also the defendant filed a counter claim under Equity Rule 30 and the plaintiff made the point that not being a resident of the district it was not suable there. The Court said (p. 1911):

"We must assume that the counter claim in question is not wholly out of the subject matter of plaintiff's suit" and (p. 1911):

"The action upon a counter claim against one already in a court of his own choosing is very different in respect to venue from hailing him into that court."

General Electric Co. v. Marvel Rare Metals Co. 287 U. S. 430

In the same effect, see:

Frank L. Young Co. v. McNeal Edwards Co. 283 U. S. 808;

Art Metal Works v. Auto Match Corp. 86 F. (2d) 884;

Fahrenwald v. Corp. 38 F. (2d) 231;

Rhodes, etc. Mfg. Co. v. International Ticket Scale Corp. 37 F. (2d) 713;

Texas Co. v. Rome Scrymser Co. 68 F. (2d) 704;

Prosperity Co. v. Am. Laundry Mach. Co. 6 F. S. 513;

Rome-Scrymser Co. v. Gaffney Mfg. Co. 5 F. S. 405.

So that if under an illegal sale the purchaser can oust the owner claim now presented by the mortgagee cannot be allowed.

But the respondent claims he has a right to redeem by the mortgage and being in ignorance that a sale had taken place under the old equity procedure the Court would have given him relief on the ground that he was entitled to redeem by the mortgage.

[illegible]

[illegible]

[illegible]

Alexander, et al., Receivers, v. Hillman, 296 U. S. 222.

The counter claim in this case is clearly a subject matter of Federal jurisdiction, because the counter claim arises under §1 (20) of the Act to Regulate Commerce. There is also the necessary diversity of citizenship to support the jurisdiction of the Federal Court.

There is considerable conflict of authority as to whether counter claims which are *not* germane to the main suit can be entertained when there is a lack of Federal jurisdiction as to the counter claim.

Tennessee Products Co. v. Warner, 39 F. (2d) 200;

Kaumagraph Co. v. General Trade Mark Corp., 12 F. S. 230.

But as the counter claim is clearly germane to the main bill, the question of Federal jurisdiction in the counter claim could not arise because being germane to the main bill it is auxiliary and dependent thereto.

XIX.

THIS DEFENDANT ALTHOUGH NOT MADE A PARTY DEFENDANT BY THE BILL IS DEFENDANT AS A MATTER OF RIGHT UNDER THE STATUTE AND MAY INTERPOSE THE COUNTER CLAIM UNDER EQUITY RULE 30.

The Defendant, H. D. Pollard, Receiver, intervened and was made a Defendant (R. 48, 49). This Defendant became a Defendant not as a matter of grace but as a matter of right under the statute. The Receiver of the Central instituted the proceedings against the Receivers of the Seaboard before the Commission and invoked the order which the Receivers are seeking to annul in this case.

U. S. C. A. Title 28, §41 (28), is the statute which gives the District Court of the United States jurisdiction "of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission".

U. S. C. A. Title 28, §§46 and 48, both provide that the cases covered by §41 (28) shall be brought against the United States.

U. S. C.A. Title 28, §45a, provides that in a case to annul or set aside an order of the Interstate Commerce Commission "any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and *as of right*, and be represented by their Counsel * * * Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

Under § 45a, it is further provided:

> "The attorney general shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the attorney general therein."

It has been decided by this Court that such an intervening defendant can take a direct appeal to the Supreme Court even though the United States should refuse to participate in the appeal and the decision of the

Supreme Court would be binding on the United States. See especially pages 24 and 25 of the decision, in which the Court holds that such intervening defendants are "parties in the Court below, as of right, and not by grace or favor".

> I. C. C. v. Oregon-Washington R. & N. Co., 288 U. S. 14, 24, 25, 26.

When a party in interest in such a case appears in the case, he becomes ipso facto and as a matter of right a defendant. It is not even necessary that the Court should pass an order making such a party a defendant.

In Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U. S. 53, affirming Brandtjen & Kluge, Inc. v. Joseph Freeman, Inc., 75 F. (2d) 472, this Court held:

> "In a patent infringement suit brought against the user of a machine, the manufacturer of the accused article was permitted to intervene. It, thereupon, answered, jointly with the defendant, denying infringement and challenging the plaintiff's patent, and, furthermore, set up, separately, a counter claim against the plaintiff for infringement of another patent, owned solely by the intervenor. There was no suggestion that the defendant had any interest in the counter claim, or that the issues tendered by or that might arise out of it could not be adjudged in a separate suit. Held: (1) that the facts alleged in the petition for intervention were insufficient to show that the intervener was the real party in interest or entitled to intervene as a matter of equitable right; (2) the counter claim was rightly dismissed; the intervener is limited to the field of litigation open to the original parties; (3) Equity Rule 30 does not authorize one given the privilege to intervene as party defendant to set up

and enforce against the plaintiff a counter claim not available to the original defendant and in which that defendant has no interest."

The case cited above does not militate against the case at bar for the following reasons:

1. The intervening Defendant in the case at bar not only had an equitable right to intervene, but had a statutory right to be a defendant and was the real party in interest.

2. The United States as Defendant could have brought forward the counter-claim which was filed by H. D. Pollard, Receiver, under the express provisions of section 1 (20) of the Interstate Commerce Act. This field of litigation was open to the original party defendant.

3. In the case cited above, the counter claim was not germane to the original bill. In the case at bar the counter claim is germane to the original bill.

XX.

THE THREE JUDGE COURT CAN DECIDE THE COUNTER CLAIM AS WELL AS THE ISSUE IN THE MAIN CASE.

A suit to enjoin an order of the Interstate Commerce Commission is an equitable suit. The process of injunction is a remedy which only a court of equity can afford. The United States District Court is given jurisdiction by U. S. C. A. Title 28, §41 (28) over cases brought to enjoin an order of the Interstate Commerce Commission.

U. S. C. A., Title 28, §§46 and 48, both provide that such suits shall be brought against the United States;

and under §45a any party in interest may become a party as a matter of right to the case brought against the United States.

If in such a case the plaintiff asks for an interlocutory injunction, the Judge of the District Court must call to his assistance two other Judges who then hear and decide the case both on interlocutory and final hearing, (U. S. C. A., Title 28, §47).

If the plaintiff does not ask for an interlocutory injunction, the District Judge does not call to his assistance the two other Judges and in that event he hears the case alone both on interlocutory and final decree. This point has been definitely decided under §266 of the Judicial Code (U. S. C. A., Title 28, §380) which is the statute which requires a three judge court in case an interlocutory injunction is sought to restrain the enforcement of a state statute by an officer or Board, and is substantially in the same words as is U. S. C. A., Title 28, §47.

Smith v. Wilson, 273 U. S. 388;

Stratton v. St. L., S. W. Ry. Co., 282 U. S. 10.

Irrespective of the number of Judges who sit in the case, it is still a case in the District Court, and it is a case of equitable cognizance, and the case is subject to the rules of procedure which relate to an equitable case. If an interlocutory injunction is invoked the three Judges sit in the case not only on the hearing of the interlocutory injunction, but they hear the case and determine it on final decree. If no interlocutory injunction is sought, the District Judge sits alone on both the interlocutory and final hearing.

In the case at bar an interlocutory injunction was sought therefore the three Judges heard the case on interlocutory and final hearing.

We maintain that the three Judges had power and jurisdiction to hear all the questions which might arise in the progress of the case. This was not a special tribunal or a statutory court confined to hear and decide the isolated question whether the order of the Commission should be annulled or set aside, and none other. The District Court is given power and authority under the statute to entertain a bill to enjoin an order of the Commission. The District Court is given jurisdiction under U. S. C. A., Title 28, §41, of twenty-eight (28) different subjects. There is nothing in the law to indicate that the jurisdiction of the District Court sitting as a court of equity in this particular matter was to be more restricted than its jurisdiction in other matters of equitable cognizance. The fact that the suit was to be instituted against the United States in the first instance does not in any respect affect the equitable powers of the District Court or its procedure. The circumstance that three Judges or one Judge sits in the case does not in any manner affect the jurisdiction or power of the District Court as a Court of equity. A justice of this Court or a Circuit Judge of this Circuit may sit at any time with the District Judge of this District, but that circumstance does not affect the jurisdiction of the District Court. The District Court in the case at bar, being composed of three Judges, there does not seem to us to be any difficulty in the three Judges deciding the whole case, both the main bill and the counter claim.

And especially is this true where the counter claim is germane to the original bill and would have been permissible under the old practice as a cross bill.

"The cross bill is auxiliary to the proceeding in the orginal suit, and a dependency upon it. It is said by Lord Hardwicke, that both the original and cross bill constitute but one suit, so intimately are they connected together."

Ayres v. Carver, 17 How. 591, 595.

"It is a rule of law in the Circuit Court of the United States that a cross bill in equity is but an auxiliary to the original suit and a dependency upon it; that is to say, it is an ancillary suit, and is always brought in the court in which is pending the original suit, of which it becomes a part * * * and it should pray that the cross cause and the original cause may be heard at the same time, and that one decree be made and entered in both causes, thus disposing of the rights of all the parties in the subject matter of the litigation."

U. S. v. Reese, 166 Fed. 347, 350.

The latter part of Equity Rule 30 is especially applicable here, which provides:

"And such set-off or counter claim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgement in the same suit both on the original and cross claims."

There may be room for argument that a defendant in a case of this character could not bring forward a counter claim which was not germane to the original bill; there does not seem to us to be any reason whatsoever why the three Judge Court in a case like this should not consider this counter claim, which is clearly germane to the original bill—a counter claim which either of the other Defendants, the United States or the Interstate Commerce Commission, could have brought

forward under the express provisions of Section 1 (20) of the Act.

It only remains to consider a case cited on this question by the Appellants.

Pittsburg & West Va. Ry. Co. v. U. S., 281 U. S. 479.

In that case, the Interstate Commerce Commission had granted the Wheeling & Lake Erie Railway Company authority to abandon its independent passenger station in Cleveland, and to use a union passenger station. The Pittsburgh & W. Va. Ry. was a stockholder of the Wheeling Company. It brought a bill against the United States and the Interstate Commerce Commission to enjoin the order of the Commission and joined in the suit as a defendant, the Wheeling Company claiming that the Wheeling Company in the contract it made with the Union Station Company had acted contrary to Ohio law and that its directors had acted without authority in the matter. The Supreme Court held first that the Pittsburgh & West Virginia Railway as a stockholder of the Wheeling Company, did not have such an interest as would authorize it to bring a bill to enjoin the order of the Commission, and, second, that there was a misjoinder of causes of action in that a suit to enjoin the order of the Commission could not be joined with a suit against the Wheeling Company to inquire into the lawfulness of its corporate action, because the two matters were wholly disconnected with each other.

The case at bar is wholly unlike the case cited. The Seaboard is seeking to set aside the order of the Commission cancelling its tariff. The Central, as a defendant, claims that through the medium of the tariff, the Seaboard is operating the Fort Benning Line without a

Certificate and asks that the Seaboard be enjoined. The two things are inextricably involved, and the case being in a Court of Equity, the Court can settle the whole controversy at one time.

XXI.

THE RECEIVERS OF THE SEABOARD CAN BE SUED IN THIS CASE, WITHOUT PREVIOUS LEAVE OF THE COURT OF THEIR APPOINTMENT, UNDER U. S. C. A., TITLE 28, §125, (JUDICIAL CODE §66).

U. S. C. A., Title 28, §125, (Judicial Code §66), provides:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

The Receivers of the Seaboard in their motion to dismiss, the counter-claim, seek to avoid this statute by saying that the relief which the counter-claim seeks, will, if granted, "directly affect and interfere with the possession, operation and control of the properties of the Seaboard Air Line Railway Company".

The injunction which is sought by the counter-claim does not affect in the slightest degree the possession, operation and control of the properties of the Seaboard Air Line Railway Company. There is no property of any kind or character involved. The injunction seeks to prevent the Receivers of the Seaboard from operating over property which is no part of the receivership.

property. The case is within the very language of the Federal statute above quoted. The injunction seeks to prohibit the Receivers of the Seaboard from doing unlawful acts in carrying on the business connected with the receivership property, but does not interfere with the possession, use or control of any receivership property.

There are very few Federal cases which are in point on this question. There are a great many Federal cases and cases in other courts where receivers of a Federal court have been sued, without leave of court, on claims for damages.

The statute has been construed as permitting suits against the Receiver in *any* court and as not confining suits to the court in which the Receiver was appointed.

McNulta v. Lockridge, 141 U. S. 327;

Texas, etc. Ry. Co. v. Johnson, 151 U. S. 81;

Erb v. Morasch, 177 U. S. 584;

Central Trust Co. v. E. T. V. & G. R. R., 59 Fed. 523, 526.

A suit was brought in a state court to prevent a Federal receiver from abandoning a railroad as a public highway. The Court held that this case was triable in the state court, that the power of the state court is plenary short of actually and physically interfering with the possession of the property.

Royal Tr. Co. v. Washburn, R. & I. R. Co., 139 Fed. 865, reversing 113 Fed. 531.

Speaking of this Statute, the Supreme Court said:

"This Act abrogated the rule that a receiver could not be sued without leave of the court appointing

him, and gave the citizen the unconditional right to bring his action in the local courts, and to have justice in the amount of his demand determined by a jury. He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal Court."

Gableman v. Peoria, etc. Ry. Co., 179 U. S. 335, 338.

The Public Service Commission of New York was held entitled to bring an action in a state court, to recover a penalty or forfeiture under the Commission Act against a Receiver appointed by a Federal court without previous leave of the Court.

People v. Joline, 121 N. Y. Sup. 857.

A receiver of a Federal court may be sued without permission of the court for injuries caused by his maintaining and keeping a structure upon the lands of the Company, which is a nuisance to the party who sues.

Meyer v. Harris, 38 Atl. Rep. 690.

The Railroad Commission of Alabama brought a suit against a number of railroads, including the Federal Receiver of a Railroad, to compel them by mandamus to unite in providing and maintaining a Union Station in the City of Bessemer. The Federal Receiver objected that he was sued without leave of the Court which appointed him. The Supreme Court of Alabama held that it was not necessary under the Federal Statute that leave of the Court appointing the Recever should be granted to sue the Receiver. The Court said:

(p. 21): "This proceeding in no way involves the actual custody or control of the Receivers of the

Atlanta, Birmingham & Atlantic Railroad Company over the property of said Railroad Company. It undertakes to take no property from them whatsoever. It simply undertakes to *compel* the receivers, in their operation of the Railroad of which they are Receivers, to obey a valid law of this State."

The Court, after citing the Federal Statute, said:

(p. 21): "Under this Section it is generally held that previous leave of the Court in which the Receiver was appointed, to sue a receiver, is necessary only where the suit involves the actual custody or control by the Receiver of the property or a part of the property of which he is in possession or control as such Receiver."

The Court further said, after reviewing the authorities:

(p. 22): "This proceeding, in so far as the insolvent Railroad Company is concerned, as already stated, grows out of the *neglect* of its Receivers to *obey* one of the general laws of this State, which law has become operative in the City of Bessemer by virtue of the order of the Railroad Commission. For their neglect or refusal to obey or carry out the terms of this law, these Receivers, or the Railroad Company of which they are Receivers, are liable to a penalty fixed by the Act. For the collection of this penalty, undoubtedly an action, without first obtaining leave of the Court in which the Receivers were appointed, would lie. * * * And as this proceeding is to compel action on the part of the Receivers in a matter growing out of their management of the property as Receivers and required of them by the law of this State, we can see no reason why the above quoted Federal Statute does not apply to this case."

Railroad Commission v. Alabama Great Sou. R. R., et al., 64 So. 13.

An action of trespass is maintainable against a receiver of a Federal court without leave to sue, for closing up a road across a railroad track.

Atkinson, Receiver, v. Kreis, 140 Ga. 52.

The employees of a Federal court Receiver of a railroad brought an injunction suit in the state court of Iowa without leave of the Federal Court to enjoin the Receiver from denying them certain rights which they termed "rights of seniority". The District Court of the United States, held, after reviewing a number of cases, that the injunction could not be maintained because the Federal Statute authorizing suits against a receiver of the Federal Court without previous leave of the Court which appointed him "applies only to suits brought for the purpose of imposing some liability on the Receiver in respect to his acts. As to all matters relating to the possession, control and management of the property by the Receiver or the conduct of the business, the jurisdiction of the Court which appointed him, and which has possession of the property through him, is exclusive."

Dickinson v. Willis, 239 Fed. 171.

The decision may be right in this particular case because the injunction order related to the management and control of the employees of the Receiver, but it is respectfully submitted that the decision is contrary to the very terms of the statute when it says that the statute applies only to suits brought for the purpose of imposing some liability on the Receiver in respect to his acts, and does not relate to matters of control and management of the property by the receiver or the conduct of the business by the receiver. The Act specifically applies to "any act or transaction of his *in carrying on the business* connected with such property. Any act of the Re-

ceiver, therefore, which is done by him in carrying on the business of the receivership subjects him to a suit in any court without leave of the court appointing him, the only limitation being that the relief granted in the suit does not interfere with the actual physical possession and control of the physical property in the hands of the Receiver. The statute relates to any act of the Receiver in carrying on his business.

XXII.

LEAVE TO SUE THE RECEIVERS OF THE SEABOARD IS NOT NECESSARY WHERE THE SUIT IS A CROSS ACTION BROUGHT IN A SUIT INSTITUTED BY THE RECEIVERS THEMSELVES.

The Receivers of the Seaboard have invoked the jurisdiction of this Court and have thereby subjected themselves to any appropriate cross action and cannot prevent this Court from rendering complete justice as between the parties on the plea that leave has not been given to sue them by the court of their appointment.

> "Where a receiver is made a party to an action by leave of court it has been held that he is in the same position as any other litigant, and that the other parties to the action entitled to affirmative relief have a right to seek it by filing cross bills against him without first obtaining leave of court. So it has been held that in an action by the receiver, defendant may, without leave of court, file an appropriate counter-claim. On the other hand, it has been held that in an action by a receiver, defendant cannot without leave of court file an answer which is in effect a cross action against the receiver."

23 C. J. §546. p. 333. citing: Kortjohn v. Seimers. 29 Mo. A. 271.

The stockholders of the American Waterworks Company commenced an action against the Denver Union Water Company and others, to annul certain decrees under which the Denver Union Water Company held title to certain property which was also claimed by the American Waterworks Company. The Receiver of the American Waterworks Company was made a party to the case. Thereupon, the Denver Union Water Company brought a cross bill against the Receiver of the American Waterworks Company to quiet the title to the property. The Receiver claimed that he could not be sued by cross bill without leave of the court appointing him. The Court held:

> (p. 633): "The receiver in the case at bar is not entitled to the application of that rule as against the cross bills. He became a party by leave of the Court. The real subject-matter of controversy was the property affected by the foreclosure decrees. The effect of the Receiver's answer was to set up a claim to this property for and on behalf of the American Waterworks Company. Having done so, he was in the same position of any other litigant, and the parties to the action interested in the subject matter of the controversy had the same right to defend against his claim, and by appropriate proceedings seek relief against his claim, as against any other litigant. Where a defendant in a suit in chancery has equities arising out of the subject matter of litigation which entitle him to affirmative relief against other parties thereto, he may, as a matter of right, present such equities by way of cross bill. * * * It was not necessary for the parties filing the cross bills to procure an order from the Chancery Court of New Jersey for leave to file the same * * *. It was eminently proper, when the

Receiver was a party to the action, for the trial court to determine the ultimate rights of all the parties to the action, in the subject matter of controversy, and thus put an end to litigation as between them over questions properly involved."

Venner v. Denver Union Water Co., 90 Pac. 628, 633.

A Receiver of a railroad brought an action for damages against the Defendant Railway Company for forcibly removing from its right of way the plaintiff's tracks which had been constructed pursuant to a contract. The defendant filed a counter claim for damages resulting from plaintiff's failure to perform his part of the contract. The Receiver objected to the counter-claim on the ground that leave to sue had not been obtained from the court which appointed him. To this contention the Court replied:

(p. 725): "True, the general rule is that a receiver can neither sue nor be sued without leave of court first obtained. But where an action has been commenced by a receiver it would be a strange rule that would require the defendant in that action, who has been brought into Court on the Receiver's summons, to obtain leave of Court to present any matter in his behalf which is germane to the controversy. It is the policy of the Code of Civil Procedure that the entire controversy between the parties shall be settled, if possible, in a single action."

Curtis v. C. & E. Ry. Co., 119 N. E. 723, 725.

A Receiver in the United States Court brought suit in a state court to recover from the defendant the rent of a certain plantation. The defendant counter-claimed on the proposition that he owned one-half of the planta-

tion and that the Receiver for a number of years had collected rent from him on the theory that he did not own any part of the plantation. The Receiver objected to this counter-claim being entertained in the suit. The Court said:

> (p. 238): "The receiver voluntarily went into the state court and having voluntarily gone there, cannot question the right of that court to determine the controversy between himself and the defendant. A similar proposition was often affirmed in cases of bankruptcy, although by §711 Revised Statutes, the courts of the United States are given exclusive jurisdiction of 'all matters and proceedings in bankruptcy' * * *. Further, the right to sue a receiver appointed by a Federal Court without leave of the Court appointing him, is granted by the Act of August 13, 1888. A counter-claim or set-off comes within the spirit of that act."
>
> Grant v. Buckner, 172 U. S. 232.

XXIII.

THE ORDER UNDER WHICH THE RECEIVERS OF THE SEABOARD WERE APPOINTED IN SUBSTANCE AND EFFECT GIVES LEAVE TO SUE THE RECEIVERS.

The order appointing the Receivers of the Seaboard, which appears in the Record, p. 326, provides:

> "Said Receivers are authorized and empowered to institute and prosecute within this jurisdictional district or elsewhere in any court or before any officer, department, commission, or other tribunal, and in their own names as Receivers or in the name of the Railway Company as they may be advised by counsel, all such actions, proceedings, or suits as in

their judgment may be necessary for the recovery or proper protection of said property, or any part thereof, and the discharge of their trust, *and likewise, to appear in and defend any and all actions, proceedings or suits which may be instituted or prosecuted against them as Receivers in or before any such tribunal.*"

This order does not say in terms that leave to sue the Receivers is granted, but the authority to the Receiver to appear and defend in any court, must necessarily mean that leave is given to sue him in any court. The Receivers are in no position to object to being sued without leave of the Court appointing them, because they have the consent of the Court to appear and defend. Especially would this be true in a case where the main suit was instituted by the Receivers themselves.

> "Where the Federal Court appointing a receiver for a railroad expressly authorizing him to defend all actions theretofore brought seeking to establish any claim against the property in his hands, including the demands of plaintiff for damages for personal injuries, such order was ample authority for the maintenance of plaintiff's action against the Receiver, regardless of whether Act of Congress of March 3, 1887, etc., providing that every Receiver appointed by any United States Court may be sued respecting any act of his in carrying on the business connected with the property without previous leave of court, authorizes such a suit without leave."

The Federal Act quoted, applies only to acts or transactions of the Receiver and would not, therefore, apply to a personal injury case which arose before the receivership. The point of the decision is that the order of the

Court authorizing the Receiver to defend such actions was equivalent to leave to plaintiff to sue the Receiver on such an action.

International & G. N. Ry. Co. v. Wynne, 122 S. W. 50.

Respectfully submitted,

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APPENDIX

Equity Rule 30

"The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill, omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but specifically admitting or denying or explaining the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. **

"The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

Applicable Sections Of The Interstate Commerce Act.

(U. S. C. A. §§ 1-27)

Certificate of Public Convenience and Necessity.

Section 1, paragraphs 18, 20 and 22 cover this matter.

Section 1, par 18: "No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall have first have been obtained from the Commission" a certificate of public convenience and necessity.

Section 1, paragraph 20: "Any construction, operation, or abandonment contrary to the provisions of this

paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest."

SECTION 1, paragraph 20 further provides: "And any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both."

SECTION 1, paragraph 22: "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, etc."

Filing of Tariff's and Prohibition of Transportation Without Lawful Tariff.

SECTION 6 (1): "That every common carrier subject to the provisoins of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carries by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall

contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. ***** The provisions of this Section shall apply to all traffic, transportation, and facilities defined in this Act."

SECTION 6 (4): "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

SECTION 6 (7): "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act."

Power of Commission to Enforce the Act.

SECTION 12 (1): "The Commission is hereby authorized and required to execute and enforce the provisions of this Act." The Commission is further authorized to request any District Attorney of the United States to institute and prosecute under the direction of the Attorney General of the United States, " all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violators thereof."

SECTION 20 (9): "That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them."

Power to Enforce the Order of the Commission.

SECTION 13 (2): "**** And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

SECTION 16 (12): "If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the Commerce Court for the enforcement of such order. If, after hearing, that Court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the Court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

Cease and Desist Orders to Rates and Practices which are Unjust, Unreasonable, or Unjustly Discriminatory, or Unduly Preferential or Prejudicial or Otherwise in Violation of the Act.

SECTION 15 (1): When the Commission shall be of the opinion "that any individual or joint rate, fare or charge **** or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission" is authorized to determine and prescribe the just rate and practice to be thereafter followed, and "to make an order that the carrier or carriers shall cease and desist from such violation, etc."

Investigation of New Rate or Practice:

SECTION 15 (7): "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice, affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice, etc."

Undue or Unreasonable Preference and Advantage Forbidden.

SECTION 3 (1): "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality,or any particular description of

traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Improper Practices Prohibited.

SECTION 1 (6) provides: "** and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Rates to Yield Fair Return on Value.

SECTION 15a (2): "In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rate so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

ELKINS ACT

REBATING FORBIDDEN

SECTION 1: " * * * And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such

property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

EMERGENCY RAILROAD TRANSPORTATION ACT 1933.

(48 Stat. 211):

"§4. The purposes of this Title are (1) to encourage and promote or require action on the part of the carriers and of subsidiaries subject to the Interstate Commerce Act as amended, which will * * * (b) control allowances, accessorial services and the charges therefor, and other practices affecting service or operation, to the end that undue impairment of net earnings may be prevented, and (c) avoid other wastes and preventable expense."

JURISDICTION OF DISTRICT COURT.

U. S. C. A., Title 28, §41 (28):

"The District Courts shall have original jurisdiction as follows: * * * Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

U. S. C. A., Title 28, §46:

"Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States, etc."

INJUNCTIONS AS TO ORDERS OF INTERSTATE COMMERCE COMMISSION; APPEALS TO SUPREME COURT.

U. S. C. A., Title 28, §47:

"No Interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or set

ting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Comerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to

the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

UNITED STATES PARTY-DEFENDANT IN SUITS AGAINST COMMISSION-INTERVENTION OF PARTIES.

U. S. C. A., Title 28, §48:

"All cases and proceedings brought under subdivisions 27 and 28 of Section 41 of this title, and sections 20 and 43 of Title 49 shall be brought by or against the United States, and the United States may intervene in any case or proceeding whenever, though it has not been made a party, public interests are involved."

U. S. C. A., Title 28, §45a:

"The Attorney General shall have charge and control of the interests of the Government in the cases specified in section 44 of this title and in the cases and proceeding under sections 20, 43, and 49 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: Pro-

vided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice, and speed the determination of such suits: Provided further, That communities, associations, corporations, firms and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General therein."

"Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

SUITS AGAINST RECEIVERS WITHOUT LEAVE OF COURT.

U. S. C. A., Title 28 §125:

"Every receiver or manager of any property appointed by any court of the United States may be sued

in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."